

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-202864

DATE: August 10, 1982

MATTER OF: Howard L. Young - Overtime Compensation

DIGEST: Claim of employee for overtime compensation for period he was away on military leave is denied. In order for such overtime to be compensable it must have been "regularly scheduled" and it must be shown employee would have been required to perform the overtime duty during the period involved. While the overtime appears to fall within the definition of "regularly scheduled" in that it was authorized in advance and scheduled to recur on successive days, the employee has not submitted evidence which clearly and convincingly shows he would have been required to work the overtime involved.

Mr. Howard L. Young has appealed the determination of our Claims Group, denying his claim for overtime compensation for the period he was on military leave from his civilian position at the Naval Air Rework Facility (NARF) in Jacksonville, Florida.

Our Claims Group denied Mr. Young's claim on the basis that the prerequisites for such compensation were not met--namely, that the overtime for which he sought compensation was not "regularly scheduled" nor was it clear that he would have been required to work the overtime had he not been away on military leave. We concur in our Claims Group's action but we do so only on the basis that Mr. Young failed to show that he would have been required to work the overtime in question. We feel that the overtime falls within our definition of "regularly scheduled" overtime.

The statutory basis for Mr. Young's claim is found in section 6323, title 5, United States Code (1976), which provides, in pertinent part, as follows:

"(a) An employee as defined by section 2105 of this title * * * permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or

efficiency rating for each day, not in excess of 15 days in a calendar year, in which he is on active duty or is engaged in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard."

Broadly stated, this provision requires that an employee receive the same compensation he otherwise would have received had he not been away on military leave. We have held that in order for overtime work to be compensable with respect to an employee on military leave, the overtime duty must have been "regularly scheduled" and it must be clear that the employee would have been required to work the overtime. Lewis E. Keith, Jr., B-159835, March 11, 1976, and cases cited therein.

Mr. Young is a member of the Naval Reserve and performed annual active duty training from October 6 to October 19, 1979. Mr. Young has submitted copies of form NARF JAX 5330/1, Additional M/H Recommendations, to show the overtime hours worked in his shop during that period. The NARF has stated that these forms are used by shop supervisors to recommend additional work hours and when approved, constitute authority for the applicable shop supervisor to direct the employees to work overtime up to the approved amount. These forms are dated but the approval signatures are not. A summary of the forms submitted to us follows.

DATE OF NARF JAX 5330/1	DATE OF OVERTIME WORK	AMOUNT OF OVERTIME WORK	NUMBER OF EMPLOYEES
10/5	10/8 Monday (Holiday)	8	8
10/9	10/9 Tuesday	2	15
	10/10 Wednesday	2	15
	10/11 Thursday	2	15
	10/12 Friday	2	15
10/11	10/13 Saturday	10	15

10/12	10/14 Sunday	10	10
10/15	10/15 Monday	2	17
	10/16 Tuesday	2	17
	10/17 Wednesday	2	17
	10/18 Thursday	2	17
	10/19 Friday	2	17

Although we do not have a form for October 6, there is a memorandum in the file from Mr. Young's supervisor stating that 8 hours of work were performed on that Saturday.

The NARF decided the overtime in question was not regularly scheduled because it did not meet the definition contained in paragraph 4 e(2)(a) of NAVAIREWORKFAC JAX INSTRUCTION 5330.2D July 26, 1977, which states as follows:

"Regular and/or Scheduled Overtime. Regular overtime is overtime which is scheduled prior to the beginning of the administrative workweek in which it occurs. For the Naval Air Facility, notification of regular/scheduled overtime shall be by name, in writing."

Our Claims Group agreed that since the overtime was not scheduled prior to the beginning of the administrative workweek in which the work was performed, the work was not regularly scheduled so as to be compensable under Keith, above.

Our decisions, however, have long held that "regularly scheduled" means duly authorized in advance and scheduled to recur on successive days or after specified intervals. See 59 Comp. Gen. 101 (1979) and cases cited therein. The overtime must be scheduled in advance. Our decisions have looked to notification 1 to 4 days in advance of the work as sufficient to constitute overtime scheduled in advance. See 52 Comp. Gen. 319 (1972); 48 id. 334 (1968). In 59 Comp. Gen. 101 supra, we held that for purposes of night differential, overtime is considered scheduled in advance so long as notification is made at least 1 day prior to the performance of overtime.

Not only must overtime be scheduled in advance to be considered "regularly scheduled", as noted above, it must also be scheduled to recur on successive days or after specified intervals. Although the overtime need not be subject to a fixed hours-of-work schedule, it must recur so frequently and at such regular intervals so as to fall into a predictable and discernible pattern. See Customs Special Agents, B-191512, October 27, 1978; and B-178653, August 6, 1973. Thus, assuming that the overtime requested by the shop supervisor was approved on the date which appears on the additional man-hour recommendations, we believe that the overtime for which Mr. Young makes his claim may be considered to be scheduled in advance. Furthermore, we believe the overtime meets the second portion of our test for "regularly scheduled" overtime because it was scheduled to recur on successive days and recurred in a predictable and discernible pattern. Except for October 6 and October 8 when 8 hours were worked, employees in Mr. Young's shop worked 10 hours every day, resulting in 2 hours of overtime every weekday during the period and 10 hours each on Saturday and Sunday.

Although NARF states that overtime was rarely scheduled in this shop the record shows that over a 14-day period overtime was scheduled for every day, but one, and the shop supervisor was able to predict the need for a certain amount of overtime in some instances as much as 5 days in advance. Accordingly, the overtime for which Mr. Young seeks compensation was regularly scheduled.

The question as to whether Mr. Young would have been required to work the overtime must necessarily be answered, however, to determine whether Mr. Young is entitled to compensation for the overtime.

First, we note that in various communications from the NARF, it is stated that overtime in that facility is voluntary. This appears to be in conflict with the Labor-Management Agreement between the NARF and the International Association of Machinists and Aerospace Workers, AFL-CIO, Naval Air Lodge 1630. Section 4, Article 10 of the Agreement provides as follows:

" * * * Overtime work is not voluntary
in nature and is subject to all of the

provisions of this Article. Under normal circumstances the EMPLOYER will, upon request by an employee, relieve the employee from the overtime assignment if the assignment would result in an unreasonable inconvenience or pose an undue hardship to the employee; and there is another employee who is qualified and can perform the work on a production basis reasonably available and willing to work. All overtime declined by an employee shall be charged as overtime worked for the purpose of determining the equity of overtime distribution."

It is our view that overtime worked under the above agreement is not made voluntary by the mere fact that an employee could in certain circumstances be relieved of working overtime.

Mr. Young contends that there were ten employees on the roster of shop #95245 and any number of employees above that number were borrowed from other shops. The NARF, however, has stated that the assigned strength of shop #95245 varied from 13 to 23 and has further stated that not all assigned employees worked overtime on the days in question. NARF submitted the following list showing the number of employees assigned to shop #95245 and the number who worked overtime.

<u>DATE</u>	<u>NUMBER ASSIGNED</u>	<u>NUMBER WORKED</u>
10/10	17	13
10/11	17	11
10/12	17	14
10/13	23	19
10/14	23	9
10/16	15	11
10/17	15	13

10/18	15	11
10/19	16	13

Mr. Young has submitted two items of evidence to substantiate his contention that all employees assigned to his shop worked overtime on the days in question. The first is a document from the Weapons Division Director to the Production Department Director forwarding Mr. Young's request for overtime. It contains, as an explanation of the reason for the request, the following statement: "Overtime for employee while on military leave when all personnel required to work." We do not interpret this as a statement of fact from the Weapons Division Director that all employees were required to work but rather simply as a statement of the reason for Mr. Young's claim.

Mr. Young also submitted 2 memoranda from his shop supervisor. In one the supervisor states, "If he had not been on military leave he would have been required to work.... In essence the whole shop was on overtime on dates as listed above." The dates the supervisor lists did not include October 6 and October 8. In a memorandum supporting Mr. Young's overtime claim for October 6 and 8 the supervisor stated, "If Mr. H. Young * * * had been available to work and not on military duty the above dates he would have been required to work overtime and holiday work, since overtime is not voluntary."

We are thus presented with a factual dispute concerning the determinative issue in this case, whether or not Mr. Young would have been required to work overtime if he had not been on military duty. As stated in section 31.7 of title 4 of the Code of Federal Regulations, claim settlements are based on the facts as established by the Government agency concerned and by evidence submitted by the claimant, and the burden is on the claimant to establish the liability of the United States for payment. Where an agency and a claimant disagree as to the facts in a case, it is our policy to accept the facts as presented by the agency in the absence of clear and convincing proof to the contrary. In light of the claimants' burden of proof we do not find the statements of Mr. Young and his supervisor, without documentation, so clear and convincing as to cause us to disregard the records of the agency.

The evidence as provided by NARF shows that only some of the employees assigned to shop #95245 worked overtime during the relevant dates. Therefore, the record does not indicate that Mr. Young would have been requested to work overtime were he not on military leave. Since Mr. Young has not shown that he would have been required to work overtime had he not been on military leave, he is not entitled to overtime compensation for the period involved. If however, Mr. Young can provide other documentary evidence which will support his contentions concerning the number of employees in his shop and the number who were required to work overtime, we shall reconsider our decision.

Milton J. Forster
for Comptroller General
of the United States